IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. **437** OF **2001**

MRS AIRAT @ AISHAT ADEOTI IBRAHIM
Nigerian National (at present
in Judicial Custody) ...Appellant.

V/s

1. Shri S.V. Pai, Inspector
of Customs, Customs (P),
N/Cell, Mumbai.

2. The State of Maharashtra ...Respondents.

Mr. V.V. Chari, Senior Counsel with F. Saldhana,
advocate for the appellant.

Mr. D.N. Salvi, advocate for respondent No.1.

Mr. A.M. Shringarpure, APP for the State.

CORAM: V.M.KANADE,J.
DATE: 6th May, 2005

ORAL JUDGMENT:

1. The appellant is challenging the judgment and order passed by the learned Special Judge in N.D.P.S. Case No. 630 of 1997. By the said judgment and order dated 26/04/2001, the Special Judge was pleased to convict the appellant for an offence punishable under section 21 of the N.D.P.S. Act, 1985 and sentence her to suffer rigorous imprisonment for a period of 10 years and to pay fine of Rs 3 lakhs and, in default of payment of fine, to further undergo rigorous

imprisonment for one and half years. The other accused who were charged alongwith the present appellant were, however, acquitted by the Special Judge.

2. Brief facts are as under:-

3. The appellant was intercepted at the Airport and the Officers recovered 6.4 kgs of Heroin which was concealed in the picture tube as part of the baggage which was checked in at the instance of the officers of Narcotic Cell. A charge was framed against the appellant and the Special Judge, on the basis of evidence adduced by the prosecution, convicted the appellant for having committed an offence under section 21 of the N.D.P.S. Act.

4. The learned Counsel appearing on behalf of the appellant submitted that a serious doubt was cast in the prosecution case regarding packing and sealing of the contraband articles which were ceased from the accused and particularly when the evidence of P.W.1 and P.W.9 did not corroborate each other regarding the place where the articles were seized. He further submitted that the prosecution had engaged services of the pliable panch witness since the said panch had

acted as panch in various narcotic seizures conducted by law enforcing agencies and, therefore, it was not safe to rely on the evidence of such panch witness. The learned Counsel, thereafter, submitted that there was a considerable delay in putting the accused under arrest and that more than 48 hours had elapsed after the interception of the accused at the Airport by the Officers of Narcotic Cell, Customs (P), Mumbai and throughout this period the accused was not produced before the Magistrate. He submitted that this further had given the Officers an opportunity to tamper with the evidence. The learned Counsel, thereafter, submitted that the seizure report which was prepared by P.W.3 - Investigating Officer S.V. Pai was solely on the basis of papers of investigation which were handed over to him and he was not the Officer who had seized the contraband from the accused nor he had arrested the accused when he was brought to the Office of the Narcotic Bureau. It was submitted that, therefore, there was non-compliance of provisions of section 57 of the N.D.P.S. Act, 1985. The learned Counsel, thereafter, submitted that from the evidence which has been brought on record, it was apparent that the tampering of the sample packets could not be ruled out as P.W. 3 - Investigating Officer S.V. Pai had the custody of the samples after the raid and the

access to the seal with which forwarding letter to Deputy Commissioner of Customs was prepared on 29/08/1997. He further submitted that the Assistant Chemical Analyser of the Deputy Commissioner of Custom's Office and FSL Kalina had not been examined by the prosecution as witnesses in this case. It was submitted that it was the duty of the prosecution to examine the Chemical Analyser and mere production of the Chemical Analyser's Report did not establish beyond the reasonable doubt that the contraband which was seized contained heroin. He relied upon the judgment of the Bombay High Court (Nagpur Bench) in the case of Raju Girdharilal Shrivastav Vs. State of Maharashtra reported in **2004 ALL MR (Cri) 3053** and upon the judgments of the Supreme Court in the case of Durand Didier Vs. Chief Secretary, Union Territory of Goa reported in **AIR 1989 SC 1966** and in the case of Kalpanaben Chandan Chatarji Vs. State of Maharashtra reported in **1994 Cri.L.J. 2000** in support of the said submissions. It was lastly submitted that when the statement of appellant - accused was recorded on 28/08/1997 and 10/10/1997, the Investigating Officer had not explained to the accused that giving of false evidence was an offence punishable under the Indian Penal Code. It was submitted that in the statement dated 29/08/1997, the Investigating Officer had not

warned the appellant that the said statement would be used against her. It was submitted that the said statement, therefore, could not be relied upon. He further submitted that the appellant had retracted all her statements which were recorded between 28th to 30th August, 1997 vide her retraction at Exhibit-1 and further second retraction of her statement dated 10/10/1997 was also made vide Exhibit-5.

5. The learned Counsel appearing on behalf of the respondent, on the other hand, submitted that there was no substance in the first submission made by the learned Counsel appearing on behalf of the appellant and, in fact, there was no discrepancy between the depositions of P.W.1 and P.W.9. He submitted that, in fact, there was no cross-examination on this point by the defence regarding tampering of the sample and, therefore, it was not open for the appellant to submit that there was possibility of tampering of the sample. He, thereafter, submitted that merely because P.W. 9 had acted as a panch in various cases that alone would not be a ground for discarding his evidence. He submitted that P.W. 9 was an employee of Etheopian Airways and since the Officers of the Narcotic Bureau were required to call for panch from the nearby vicinity, the said panch who was available near the

Airport was requested to act as a panch. He submitted that, therefore, on this ground, there is no reason to discard his evidence. He further submitted that merely because there is delay in arresting the accused that would not be a ground to doubt the veracity of the statement which was recorded under section 67 of the N.D.P.S. Act. He submitted that the Officers were under an obligation to examine the accused regarding her knowledge of possession of the contraband and only after the Officers came to the conclusion that the accused was involved in the offence, the accused was arrested. He further submitted that so far as the 4th point on which the submission was made by the learned counsel for the appellant regarding non-compliance of section 57 of the N.D.P.S. Act is concerned, he submitted that the Supreme Court in the case of State of Punjab Vs. Balbir Singh reported in **AIR 1994 SC 1872** has held that the compliance of section 57 is not mandatory and if no prejudice was caused to the accused that could not vitiate the prosecution case. So far as the submission of the appellant regarding the possibility of tampering of samples by the Investigating Officer is concerned, he submitted that the sample packets were heat sealed and were kept in brown colour envelope which was wax sealed and the signatures of

panchas, officers and that of the accused were taken and the said packets were received by both the laboratories with "seals intact". He further submitted that, therefore, there was no substance in the arguments of the learned counsel appearing for the appellant. He further submitted that merely because the Chemical Analyser was not examined that could not create any doubt regarding the contents of the contraband. He relied upon the judgment of the Supreme Court in the case of Jagdish Budhroj Purohit vs. State of Maharashtra reported in **AIR 1998 SC 3328** in which it was held that the report of the Chemical Analyser, if corroborated by the members of the raiding party, is sufficient evidence for convicting the accused and mere non-examination of the Chemical Analyser was not fatal to the prosecution case. On the last point regarding non-compliance of section 67 of the N.D.P.S. Act, he submitted that the accused had retracted the statement after about 20 days. He submitted that the statement under section 67 had been corroborated by other witnesses and, therefore, there was no reason to doubt the veracity of the statement which was recorded under section 67 which was clearly admissible in evidence.

6. I have given my anxious consideration to the submissions made by the learned counsel appearing on behalf of the appellant and the learned Counsel appearing on behalf of the respondents.

7. In the present case, the appellant alongwith two other accused was charged for having conspired to commit and/or abate commission of offences under the N.D.P.S. Act in contravention of the provisions under section 8(c) of the N.D.P.S. Act and, therefore, committed an offence punishable under section 29 read with sections 21 and 23 of the N.D.P.S. Act. She was further charged alongwith other two co-accused that in pursuance of the said conspiracy, she acquired on/or about 28/8/1997 6.4 kgs. of heroin and concealed it in picture tube of the television set and was apprehended while boarding Ethiopean Airways Flight dated 28/8/1997 and thereby committed an offence punishable under section 21 of the said Act. She was further charged for an offence punishable under section 28 read with section 23 of the N.D.P.S. Act. She was fourthly charged for using fake pass-port and was charged for having committed an offence under section 12(1)(d) of the Pass-ports Act, 1967. The accused No.3 was also charged for carrying fake Pass-port. The trial court acquitted the other two

co-accused of all the offences with which they were charged.

8. The accused No.1 was acquitted of the offence punishable under section 29 of the N.D.P.S. Act on the ground that the charge of conspiracy had not been proved against all the accused. The appellant - accused No.1 was also acquitted of the offence punishable under section 12(1)(d) of the Pass-ports Act, 1967. The appellant, however, was convicted of the offence punishable under section 21 of the N.D.P.S. Act and was sentenced to suffer rigorous imprisonment for 10 years and to pay fine of Rs 3 lakhs and, in default, to further undergo rigorous imprisonment for a period of one and half month. The appellant - accused is in jail since the date of her arrest on 28/8/1997 and has already undergone, almost 8 years of the sentence.

9. The prosecution case in brief is that the information was received that the appellant was carrying contraband in her baggage which information was reduced into writing and the information was given to the superior officer and, accordingly, a watch was kept on the passenger list as the Officers of the Bureau had learnt that the contraband was being

carried on the Ethiopean Airways Flight which was bound towards Nigeria. The Intelligence Officers accordingly asked the appellant to identify her baggage. She identified her baggage including her cartons which contained a television set. She was informed of her rights under section 50 of the N.D.P.S. Act and, thereafter, the carton was opened and the television set was dismantled and there they noticed that white powder was concealed in the picture tube. The chemical test was performed and it transpired that the said powder was heroin and was weighing about 6.4 kgs. The statement of the appellant under section 67 of the said Act was recorded. She admitted that she was carrying the contraband and had knowledge about the contents of the picture tube. She was accordingly arrested. The panchanama was made. After the heroin powder was sealed in three samples of 5 gms each, the remaining powder was also seized and the samples were sent for chemical analysis. The report confirmed that the powder was heroin. The statement of witnesses and the panchas were recorded. The appellant, thereafter, took the Intelligence Officers to 2/3 hotels where she had stayed and on information being given by her, two other co-accused were arrested and their statements were recorded under section 67 of the said

Act, where they confessed that they had conspired with the appellant to commit the said offence.

10. The prosecution examined 13 witnesses. Most of the witnesses are Intelligence Officers and other witnesses are the Panch witnesses in whose presence the panchanama was performed and 2/3 witnesses are the owners of the various hotels where the appellant/accused had stayed.

11. The trial court has convicted the appellant-accused on the basis of the contraband which was seized at the airport which, after chemical analysis was done, revealed that it was heroin. The trial court disbelieved the statement which was made by the appellant under section 67 and also the statement which was made by the other two co-accused.

12. The learned Counsel appearing on behalf of the appellant submitted that the serious doubt was caste on the prosecution case regarding the seizure of the contraband at the airport. Secondly, he also attacked the panch witness who was examined as P.W.9 on the ground that the said witness had acted as panch on number of occasions and, therefore, it was not proper to place reliance on his testimony. He further

submitted that there was non-compliance of section 57 of the N.D.P.S. Act. He further submitted that tampering of the sample packets cannot be ruled out and, lastly, it was submitted that the Chemical Analyser had not been examined by the prosecution and, as such, there was a serious lacuna in the prosecution case and it had not been established that what was seized was heroin.

13. There is substance in the submissions made by the learned Counsel appearing on behalf of the appellant regarding the seizure of the contraband articles at the airport. In this context, the evidence of P.W. 1 - Issac who was an Intelligence Officer and P.W. 9 - Kotian who acted as panch in respect of seizure of the contraband is relevant. The case of the appellant is that the television in which the contraband was found in the picture tube was put in a carton. It is the case of the prosecution that the said carton was having a baggage tag which is at Exhibit 21 and this baggage tag at Exhibit-21 corresponded with the air ticket which was found to be in possession of the appellant and which is at Exhibit 18. The contention of the appellant's counsel is that the baggage identification tag at Exhibit-21 is a fabricated document in view of the clear discripancy between the

weight of the checked-in baggage appearing on the air-ticket at Exhibit-18 and the weight of the television and the contraband and weight of the excess baggage.

14. P.W. 1 - Albet Issac was the Inspector, Customs(P) N-Cell, Mumbai. He has stated in his evidence that Superintendent M. K.J. Sanchis informed him on 27/8/1997 that information had been received that one Nigerian lady was going to travel by Ethiopean Airways Flight No.641 dated 28/8/1997 at about 8.45 a.m. which was to subsequently land at Adi-s-ababa airport. On the next day, he went to the airport and collected the copy of the passenger list of the said aircraft from the Air India Counter and the name of the suspect was found at serial No. 140 in the said list. The officers of the Narcotic Bureau (hereinafter referred to as "NCB") also approached him and it transpired that they have also received the similar information. Two panchas from Ethiopean Airlines viz. Mr. Kavin D'souza and Narendra Kotian were called. He has stated that their team was headed by one Mr. Pandey and, at about 7.30 hours, the African lady presented her travel documents at the Customs Counter. P.W. 1 identified the accused who was sitting in the dock. He has further stated that

three baggage-claim-tags were found on the rear side of the ticket which was presented by the accused. The number of the Boarding Pass was Serial No. 89 and the excess baggage fare ticket showed that 15 kgs. was excess baggage and that the payment for excess baggage had been made. When the accused presented her documents at the Customs Counter, according to P.W.1, she had a dark blue coloured trolly suitcase and brown coloured leather hand-bag and that she confirmed that she had three pieces of checked-in baggage i.e. two carry all bags and there was one corrugated carton. She informed that it contained television set. P.W. 1, thereafter, has stated that Pandey asked the accused to come to the baggage examination hall and that Pandey informed her of her rights under section 50 of the N.D.P.S. Act. P.W. 1 has further stated that she identified the carton from the baggage which was lying at the baggage examination hall. Thereafter, he has stated that TV was removed from the carton and the picture tube contained brown powder which tested positive for heroin. He has stated that three samples, each weighing five grams were drawn from the powder and the samples were collected in separate poly-sachets and further packed in separate brown coloured envelopes. The envelopes were pasted and sealed with the seal of Supdt., Customs (P) III,

Bombay and which were signed by Panchas, Mr. Pandey and by the accused. This witness has further stated that poly-bag containing the balance powder was heat-sealed and was further packed in carton. The carton was closed, tied and sealed with the same seal. A label bearing the particulars of the contents and the signature of the accused, panchas and Mr. Pandey was affixed on the carton. The panchanama was prepared regarding the documents which were seized and panch Narendra Kotian signed it and also initialled the corrections which were made in the panchanama. P.W. 1 produced other documents and also produced the baggage identification tag and it was marked as Exhibit-21.

15. P.W. 9 - Mr. Narendra Kotian has stated that Mr. Pandey, the Customs Officer approached him at 6.30 a.m. and told him about the information which they have received. He was told that his assistance was required. He has further stated that the accused was asked to identify her baggage and, after the carton was identified, a TV was taken out and in the picture tube brown sugar was found. Three samples, each weighing 5 mgs, were drawn from the powder. The poly-bags were heat sealed. The remaining powder was tied and packed into one carton. P.W. 9 identified

Exhibit-21 which was the baggage tag found on the carton at Article-1. This witness was examined and it is transpired that he has acted as panch in number of cases. In his cross-examination, P.W.9 has admitted that in the case of checked-in-baggage without locks, limited liability tag is applied to such baggage. He has stated that he did not find such a tag on the bags identified by the accused. Thereafter, he has admitted that the ticket at Exhibit-18 showed that the permissible limit for the checked-in-baggage was 30 kgs for business class and 20 kgs for economic class passengers. He has stated that the total weight which was endorsed on air-ticket was 45 kgs. Further, P.W. 9 has admitted that he did not remember whether the tag at Exhibit-21 was removed from the carton in his presence. He has denied the suggestion that he was called at the Custom's counter and his signatures were obtained on various labels and pre-prepared documents. From the evidence of P.W. 1 and P.W.9, it appears that there are several discrepancies in the statement of these two witnesses and a doubt is created whether the contraband articles were, in fact, seized at the airport. P.W. 9 in his evidence has stated that three samples, each weighing 5 gms were drawn from the powder and the samples were collected in separate small poly-bags and poly-bags were heat sealed and,

thereafter, packed in separate brown envelopes and signatures were obtained on the said envelopes and he has stated that the balance powder in the poly-bags was tied in one carton which was labelled and sealed, whereas P.W. 1 has stated that three samples, each weighing 5 gms were drawn from the powder and samples were collected in separate poly-sachets and further tagged in separate brown paper envelopes which were sealed with the seal of Supdt., Customs (P)III, Bombay. P.W.1, therefore, states that all the samples were put in three brown envelopes separately and he does not mention that sample poly-sachets were heat sealed. The perusal of the panchanama dated 28/8/1997 discloses that the panch has stated in the panchanama that the panchas had put their signatures on all three envelopes and the signature of the accused was also taken on all the envelopes and, thereafter, the balance quantity was put into polythene bag and heat sealed and it was put into carton and it was pasted and sealed with the seal of the customs. Thus, there is a discripancy regarding sealing of the samples which were taken and which were put in brown envelope and also the manner in which the powder was put in carton. Further, from the admission of P.W.9 that he had been a regular panch witness, it is difficult to rely on this independent witness and it does create

doubt regarding the place of seizure of the contraband and the sealing of the same. Further, from the evidence of P.W.9, it can be seen that apart from being the usual witness of the prosecution, even during the time of the alleged search and seizure, he has stated that both the panchas had taken a round at the checked-in counter for the purposes of supervision. He has stated that the distance between the checked-in counter was about 150 to 200 ft. from the Custom's counter. He has also admitted that he did not remember whether Article-21 was removed from the carton in his presence. This does indicate that the panchas were not witnesses to the entire search and seizure operation. It is well settled that if it is found that the panch witness is pliable witness who has acted as a panch for the prosecution in number of cases, complete reliance cannot be placed on the testimony of such witness.

16. Further in the backdrop of the discripancy in respect of the search and seizure of the contraband, a further doubt is created regarding the manner in which the sample packets had been kept in the custody of the Investigating Officer P.W. 3 - S.V. Pai. P.W.3 has stated in his evidence that the accused and the seized articles were brought to the office in the afternoon

on 28/8/1997 and Mr. Sanchis had asked him to go through the seizure papers ad take over the investigation. He has further stated that he prepared a seizure report and placed it before Mr. Sanchis, Superintendent and Mr. S.P. Singh. From this evidence, it can be seen that P.W. 3 - S.V. Pai, the Investigating Officer had custody of the samples and also had an access to the seal with which the forwarding letter to Dy. C. C. was prepared on 29/8/1997. P.W. 3 in his evidence has stated that after Mr. Sanchis, Superintendent, handed over the three sealed envelopes, he kept those envelopes in his safe custody. He has further stated that on the same day i.e. on 29/8/1997, he deposited one sealed envelope with the seals intact, containing sample with Dy.C.C. under the test memo prepared by him at Exhibit-34. P.W.3 has further stated that he collected remnant samples in the envelope - Article 4 alongwith the test report. From the evidence of P.W. 3, it can be seen that he has further stated that on 8/10/1997, he handed over the sealed envelope with the seals intact, containing sample and forwarding letter with memo to I.O. Mr. Palani Vel with instructions to deliver it to the FSL. He has further stated that on the same day, delivery of the envelope was made and it was returned with the receipt of the OC of the

forwarding letter. P.W. 3 has further stated that the exact time was not put on the memo. Further, he has stated that he obtained a seal from Mr. Sanchi, Superintendent, and that the memo at Exhibit-34 was prepared on computer by him and that Mr. Sanchi, Superintendent, did not obtain his signature when the seal was taken from him.

17. I have already mentioned hereinabove that there has been discrepancy in the evidence of P.W.1 and P.W.9 in respect of the seizure and sealing of the contraband at the airport. Considering the evidence of P.W.3, it is difficult to believe and certainly a doubt is created as to whether what was allegedly seized from the possession of the accused was the same material which was sent to the Chemical Analyser. There is further delay in sending the samples to the Dy.C.C.'s office particularly when both the offices are located in the same building.

18. Further, from the evidence of P.W.9, there appears to be a discrepancy between the weight of the carton which was seized at the airport and the weight which was shown at Exhibit-18 which was the air-ticket and the prosecution has not been in a position to explain the discrepancies. In this view of the

matter, it is not possible to accept the prosecution case in respect of the seizure of the contraband at the airport from the baggage which belonged to the accused No.1 - appellant herein.

19. Once this evidence regarding seizure and search of the contraband at the airport is discarded including the procedure which was adopted of sealing the said contraband and possibility of tampering of the said seals being not ruled out, the appellant is entitled to be given the benefit of doubt. The trial court has not relied on the statements of the accused which were recorded under section 67. Even otherwise, the statements which are recorded under section 67 cannot be completely relied upon particularly when the said statement has been retracted immediately at the first available opportunity. The prosecution has not been in a position to explain the reason why the appellant remained in their custody from 7.30 a.m. on 28/8/1997 till she was shown to be arrested on 30/8/1997. There was no explanation tendered by the prosecution why the contraband which was sealed on 28/7/2000 in the morning was not promptly produced before the authorities as required under section 57 of the N.D.P.S. Act. It is an admitted position that this was done nearly after 48 hours. Thus, there has

been a clear non-compliance of section 57 of the N.D.P.S. Act. In the retracted statement, the accused has stated that he was compelled to sign all the documents and she had no other alternative but to sign all the documents which were placed before her. In view of this evidence, it is not possible to convict the accused only on the basis of confessional statement which was recorded by the officers of the Bureau under section 67 which was promptly retracted thereafter.

20. The appellant even otherwise had already undergone 8 years of sentence out of 10 years which had been awarded by the trial court. The appellant has been acquitted of the charges of conspiracy and the other charges which have been levelled against her. Under all these circumstances, the appellant is entitled to be given benefit of doubt. The trial court has not taken into consideration the discrepancies in the evidence of these important key witnesses and, therefore, the finding of the trial court on this point will have to be set aside.

21. In the result, the judgment and the order of the trial court is set aside. Appeal is allowed. Appellant-accused is acquitted of the offence with

which she was charged. Appellant-accused to be released forthwith unless she is otherwise required in any other case. Pass-port of the accused be returned by the Sessions Court.

(V.M. KANADE, J.)